

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN LAMONT SPEARS,

Defendant-Appellant.

UNPUBLISHED
December 10, 2009

No. 286911
Kent Circuit Court
LC No. 08-002697-FC

Before: Markey, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of assault with intent to murder, MCL 750.83; first-degree home invasion, MCL 750.110a(2); felon in possession of a firearm, MCL 750.244f; and possession of a firearm during the commission of a felony, MCL 750.227(b)(a). Defendant was sentenced to 25 to 60 years' imprisonment for his assault with intent to murder conviction, to 20 to 50 years' imprisonment for his first-degree home invasion conviction, 6 to 30 years' imprisonment for his felon in possession of a firearm conviction and two years' imprisonment for his felony-firearm conviction. We affirm defendant's convictions and sentences for home invasion, felon in possession and felony firearm; we vacate defendant's conviction and sentence for assault with intent to murder and remand for a new trial on that charge.

Defendant first argues that the supplemental jury instruction regarding the definition of murder provided at the jury's request effectively instructed the jury that it could convict defendant of assault with intent to murder based on an intent less than an actual intent to kill. We agree. "This Court reviews de novo claims of instructional error." *People v Dupree*, 284 Mich App 89, 97; ___ NW2d ___ (2009). "It is axiomatic that a defendant has a right to have a properly instructed jury pass upon the evidence." *People v Haggart*, 142 Mich App 330, 338; 370 NW2d 345 (1985). When a trial court gives both a correct and incorrect instruction, this Court presumes that the jury followed the incorrect one. *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995). Jury instructions must include all elements of the charged offense and any material issues, defenses, and theories that are supported by the evidence. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). "Instructions are read as a whole rather than extracted piecemeal to determine whether error requiring reversal occurred." *Id.*

"The elements of the crime of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v*

Plummer, 229 Mich App 293, 305; 581 NW2d 753 (1998). “A defendant is guilty of assault with intent to murder only if there is an actual intent to kill.” *People v Burnett*, 166 Mich App 741, 757; 421 NW2d 278 (1988). But a murder conviction may be based on “an intent to kill, an intent to inflict great bodily harm, or a wanton and wilful disregard of the likelihood that the natural tendency of the actor’s behavior is to cause death or great bodily harm.” *People v Taylor*, 422 Mich 554, 567; 375 NW2d 1 (1985).

In *People v Crawford*, 128 Mich App 537, 538; 340 NW2d 323 (1983), the trial court instructed the jury that to find the defendant guilty of assault with intent to murder, it must find that the defendant intended to murder the victims. The trial court also instructed the jury:

Murder is the killing of one person by another with malice. Malice is a term with special meaning in the law. Malice means that the defendant intended to kill or that he consciously created a very high degree of risk of death with knowledge of the probable consequences of his act and that he did so under circumstances which did not justify, excuse or mitigate the crime. [*Id.* at 538-539.]

Based on these instructions, this Court determined that “the jury was authorized to convict defendant of assault with intent to commit murder upon finding either that he intended to kill the officers or that he intended consciously to create a very high degree of risk of death with knowledge of the probable consequences of his acts.” *Id.* at 539. Because an actual intent to kill must be proven to support a conviction of assault with intent to commit murder and because the defendant’s intent was the sole disputed issue, this Court held that the improper instruction required reversal of defendant’s assault convictions and remand for a new trial. *Id.*

In the present case, after the trial concluded, the trial court properly instructed the jury on the elements of assault with intent to murder. With regards to the intent element, the trial court stated: “the defendant intended to kill the person he assaulted, and the circumstances did not legally excuse or reduce the crime.” The trial court further stated “[t]he defendant can only be guilty of a crime of assault with intent to commit murder if he would have been guilty of murder had the person he assaulted actually died.” The court went on to instruct the jury regarding mitigating factors that could reduce the crime of murder to voluntary manslaughter, and also instructed the jury on the elements of the lesser-included crimes of assault with intent to great bodily harm and felonious assault. The parties did not object to these instructions.

After a few hours of deliberation, the jury asked for a definition of murder. In response to the jury’s request, the trial court stated:

In general murder can be defined as follows. And I’m going to give a copy of this to your foreperson. A person who kills another is guilty of the crime of murder if the murder is committed with malice aforethought. Malice aforethought is the intention to kill, actual or implied, under circumstances which do not constitute excuse or justification or mitigate the degree of the offense to manslaughter. The intent to kill may be implied where the actor actually intends to inflict great bodily harm or the natural tendency of his behavior is to cause death or great bodily harm.

Please remember that the third element in count one, of assault with intent to commit murder. That element requires that the defendant intended to kill the person that he assaulted.

We conclude, as in *Crawford, supra* at 539, the jury instructions provided by the trial court were misleading and authorized the jury to convict defendant of assault with intent to commit murder on less than an actual intent to kill. Though we recognize that the trial court attempted to remind the jury that defendant had to intend to kill the victim, this statement was not effective because the only definition of murder provided to the jury indicated this intent could be implied. Because assault with intent to commit murder is a specific intent crime and because defendant's intent was the sole issue at trial, we hold that the jury instructions were impermissible. *Crawford, supra* at 538; *Burnett, supra* at 757. We vacate defendant's conviction and sentence for assault with intent to commit murder and remand for a new trial on that charge.

Defendant next contends that the trial court abused its' discretion when it scored offense variable ("OV") 4, MCL 77.34, for ten points when there was no evidence to support that either the victim or defendant's former girlfriend suffered psychological harm as a result of the shooting. MCL 777.34(1)(a) provides that OV 4 may be scored for ten points if "[s]erious psychological injury requiring professional treatment occurred to a victim." When determining the appropriate score for OV 4, the fact that the victim did not seek professional treatment is not conclusive. MCL 777.34(2). In present case, defendant's former girlfriend testified that she ran and hid in a closet until the shooting ended and that she was "scared" during the shooting. This was sufficient evidence to justify the trial court's decision to score OV 4 for ten points. See *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004).

Defendant also argues that OV 9, MCL 777.39, was misscored for ten points because defendant's former girlfriend was never in any danger of being injured or killed as a result of the gunshots. OV 9 may be scored for 10 points if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death . . ." MCL 777.39(1)(c). "[O]nly people placed in danger of injury or loss of life when the sentencing offense was committed (or, at the most, during the same criminal transaction) should be considered." *People v Sargent*, 481 Mich 346, 351; 750 NW2d 161 (2008). OV 9 must be scored only for conduct that occurred during the sentencing offense. *People v McGraw*, 484 Mich 120, 133-134; 771 NW2d 655 (2009). In the present case, evidence presented at trial revealed that while defendant was invading the home, he shot a gun several times toward the area of the basement stairs. Defendant's former girlfriend was at the top of the basement stairs when the shooting began, which established she was in the immediate vicinity when the shooting occurred. Thus, the score of ten points was proper.

Defendant argues that the offense variables were scored based on facts found by the trial court and not proven to a jury beyond a reasonable doubt and that this fact-finding increased the legislatively authorized range of punishment in violation of his Sixth Amendment rights, *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and his right to due process, *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). Defendant further argues that the Court wrongly decided *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Michigan's sentencing scheme is unaffected by the United States Supreme Court holdings, *Blakely, supra* at 296, and *Apprendi, supra* at 466, because Michigan utilizes an indeterminate sentencing scheme in which the trial court sets the minimum sentence but can

never exceed the statutory maximum sentence. *Drohan, supra* at 162-164. Though defendant argues that *Drohan, supra*, was wrongly decided, we are bound to follow decisions issued by our Supreme Court. *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253 (2002), remanded 467 Mich 888 (2002), on remand 256 Mich App 674; 671 NW2d 545 (2003).

Defendant also argues that the trial court improperly ordered restitution without complying with the requirements of MCL 771.3(5). MCL 771.3(5) states “[i]f the court requires the probationer to pay costs under subsection (2), the costs shall be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer.” Because it is undisputed defendant was sentenced to prison and is not a probationer, this statute is inapplicable to the instant case.

Defendant next argues that the trial court impermissibly failed to consider defendant’s ability to pay the restitution before imposing the restitution order pursuant to MCL 780.766(2). Pursuant to MCL 780.766(2), a trial court “shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of defendant’s course of conduct that gives rise to the conviction or to the victim’s estate.” After June 1, 1997, MCL 780.767 “no longer includes the defendant’s ability to pay among the factors to be considered when determining the amount of restitution.” *People v Crigler*, 244 Mich App 420, 428; 625 NW2d 424 (2001). Thus, contrary to defendant’s claims, the trial court was not required to consider defendant’s ability to pay.

Defendant further alleges that he was denied the effective assistance of counsel because his attorney did not object to the order of restitution where the trial court failed to investigate defendant’s ability to pay. Because the trial court was not required to consider defendant’s ability to pay, an objection by defense counsel on this ground would have been futile and did not constitute ineffective assistance of counsel. *People v Petri*, 279 Mich App 407, 415; 760 NW2d 882 (2008) (A defense counsel need not make a futile motion to be effective.)

We affirm in part, vacate in part and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Christopher M. Murray